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Supreme Court, U.S.
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No-01-841

# In the Supreme Court of the United States

CHARLOTTE J. CHENOWETH, PETITIONER,

v.

HILLSBOROUGH COUNTY, a political subdivision of the State of Florida, RESPONDENT

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

The Opposition Brief does not dispute the factual or procedural history set forth in this Petition. Nor does it assert any relevant factual or procedural history that was not contained in the Petition, except to point out that Dr. Stevenson testified that the current data is insufficient to determine whether Lamictal causes birth defects. Ms. Chenoweth does not dispute that testimony.

## I. MS. CHENOWETH'S PETITION SATISFIES THE STANDARDS FOR REVIEW ON CERTIORARI, PURSUANT TO RULE 10.

a. The Eleventh Circuit decided two important questions of federal law that have not been, but should be, settled by this Court.

i. Whether Epilepsy is a disability:

The decision of the Eleventh Circuit describes Ms. Chenoweth as a person suffering from focal onset epilepsy, manifested by seizures sufficient to make it unsafe for her to cook, bathe or drive. In analyzing whether this qualifies her as a having a "disability," the circuit court discussed the activities of driving, working and reproduction. Upon concluding that driving is not a major life activity, that Ms. Chenoweth was not substantially limited in the major life activity of working, and that the limitation to her reproduction was not relevant, the circuit court affirmed the district court's summary judgment that Ms. Chenoweth is not "disabled" within the meaning of the ADA. Because the circuit court does not state that its evaluation of Ms. Chenoweth's Epilepsy was limited to the major life activities discussed therein, said decision, in essence, makes a general determination that Epilepsy *is not a disability* within the

meaning of the ADA. Such a conclusion impacts thousands of people who suffer from Epilepsy and, therefore, is an important question of federal law, which has never been addressed by this Court.

ii. Whether an employer must accommodate known collateral limitations of a disability.

The circuit court, in its decision below, stated that it was analyzing Ms. Chenoweth's major life activities to determine if they are substantially limited by her Epilepsy, so as to qualify her for accommodation of the limitations she suffers as a result of her seizures and their effect on her ability to drive. The court also appears to indicate that the record establishes at least a *prima facie* case for substantial limitation to Ms. Chenoweth's major life activity of reproduction, when it points out that childbearing is a major life activity, and that Ms. Chenoweth's Epilepsy has an "effect" on, and an "increase in risk" to, her reproductive capacity. Despite this indication, however, the court ruled that Ms. Chenoweth was not eligible for accommodation, because *reproduction* has no "relevance" to her work or to the accommodations she requested.

This decision clearly concludes that the ADA does not require employers to accommodate *collateral* limitations of a disability. Such determination is a broad and sweeping pronouncement that places a heretofore-unseen hurdle in the path of *all disabled workers* (not just those suffering from Epilepsy) seeking to obtain accommodation for their limitations. Further, such pronouncement is in direct conflict with the plain language of the ADA. For these reasons, this is also an important question of federal law that has not been, but now should be, addressed by this Court.

b. As discussed in the Petition, the decision below, in holding that Ms. Chenoweth's Epilepsy is not a disability under the ADA, is in conflict with the decision of the Eighth Circuit in *Otting v. J.C. Penney Company*, 223 F3d. 704 (8th Cir. 2000).

## II. THE ISSUE OF WHETHER SPORADIC CONSCIOUSNESS-LOSING SEIZURES SUBSTANTIALLY LIMIT "ANY" MAJOR LIFE ACTIVITIES, IS PROPERLY BEFORE THIS COURT FOR CONSIDERATION.

a. This issue is *not* improperly being raised for the first time in this Petition:

Ms. Chenoweth makes two separate arguments as to how her Epileptic seizures satisfy the above noted standard:

1. Sporadic seizures substantially limited the recognized major life activities of working and caring for oneself, as well as the unrecognized major life activities of maintaining consciousness and driving:

2. The brief but dramatic interruption of numerous major life activities, which results from Epileptic seizures, is, itself, sufficient to establish that those activities are substantially limited.

Although the Opposition Brief does not expressly say so, it is presumed that it is objecting to the Petition's raising of the major life activities of caring for oneself, maintaining consciousness, walking, talking, seeing, speaking, hearing, and performing manual tasks, on the ground that Ms. Chenoweth did not adequately raise these major life activities in her arguments below. In response, Ms. Chenoweth contends that she did adequately raise these

major life activities below and, even if it is found that she did not, that she should not be prohibited from having them considered by this Court.

i. These activities were raised below.

Because the Epilepsy Foundation had agreed to submit an Amicus Brief on the issue of Epilepsy's general qualification as a disability, prior to the filing of Ms. Chenoweth's initial brief below, Ms. Chenoweth's appellate counsel limited his attention to the other rulings of the district court and to the specific major life activities (working, driving and reproduction) that arose out of the particular facts of this case.[1] The Amicus Brief expressly argued that the major life activity of *caring for oneself* is substantially limited by Epileptic seizures. (*See* Amicus Brief, pages 11-15).

All briefs in the appeal below were filed by May 22, 2000. (*See* Appellant's Reply Brief, Certificate of Service). The decision in the *Otting* case, which is the basis for the second argument listed above, was not rendered until after Ms. Chenoweth's Reply Brief was filed below. Further, the major life activities of caring for oneself and maintaining consciousness, as well as the *Otting* decision, were expressly

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[1] It is interesting to note that appellate counsel did discuss the concept of "consciousness," as it is effected by seizures, in his Reply Brief, at page 15, footnote 3, when he stated:

> The record is clear from her physicians deposition (which is unrebutted) that when she was told not to drive, Ms. Chenoweth was experiencing *grand mal* seizures leading to complete loss of consciousness. The fear of losing consciousness is a significant limitation on all major life activities, which require consciousness to start and end them. For some epileptics this fear of losing consciousness is totally incapacitating.

brought to the circuit court's attention through a timely filed Petition for Panel Rehearing.

ii. Even if the questioned major life activities were not adequately raised below, Ms. Chenoweth should not be prohibited from having these major life activities considered by this Court.

Ms. Chenoweth recognizes that it is the normal practice of this Court to limit its consideration of major life activities to those that have been presented and ruled upon below. *See, Bragdon* at 638. Based on the *cumulative effect* of the following factors, however, it is respectively submitted that such practice would be fundamentally unfair in this case, and should not operate to prohibit Ms. Chenoweth from having these major life activities considered by this court:

1. *Identification of a specific major life activity that is substantially limited by a given impairment involves an extremely complicated legal analysis.* This analysis involves three steps: a medical determination as to which of all "life activities" are limited by the impairment; a legal determination as to which of those life activities are "major;" and another legal determination as to which of these *major* life activities are "substantially" limited by the impairment. Given there is no precise definition for what is a "major" life activity, and given that there is very little guidance for determining when a major life activity is "substantially" limited, this can be an extremely difficult exercise, *especially* when the subject impairment (e.g. Epilepsy, Narcolepsy, HIV, etc.) is one that does not *obviously* substantially limit one of the major life activities which has been expressly identified by the EEOC. 29 C.F.R. §1630.2(i).

2. *This task was further complicated by the fact that this issue did not even arise until the eve of trial when*

*Hillsborough withdrew its stipulation that Epilepsy is a disability.*

3. *Any failure to raise the questioned major life activities below, was a result of the enormous difficulty one faces in identifying the specific major life activities affected by consciousness-losing seizures, and in trying to explain how those activities are substantially limited. It was not the result of lack of diligence on Ms. Chenoweth's part.* Very few courts have ever addressed the qualification of Epilepsy as a disability, and no other court that we are aware of has ever concluded to the contrary, at least when consciousness-losing seizures were involved.

4. Epilepsy *is an important, and long recognized, disability that was an important motivating factor in Congress' attempt, through passage of the ADA, to eliminate discrimination against persons suffering with disabilities.* For this reason, it is respectfully submitted that this Court should take great care to correct any published federal court decision that may *unnecessarily* erode Epilepsy's qualification as a disability under the ADA. The opinion of the circuit court below is the only federal court of appeals decision, which we are aware of, that has found Epilepsy, when manifested by conscious-losing seizures, not to be a disability.

5. *When viewed in the context of disabilities as a whole, Epilepsy is a relatively unique disability, distinctly different from most other disabilities.* Most disabilities are exhibited by a chronic, persistent limitation to a recognized major life activity, and the fact that the limitation is substantial, is often obvious. (The blind cannot see; the deaf cannot hear; the crippled cannot walk, etc.). With the disability of Epilepsy, the limitations appear to be brief, few and infrequent. Even though Epileptic seizures, while they are occurring, cause extreme and dramatic interruptions to

many recognized major life activities, it is not clear how those activities are "substantially" limited

6. *As discussed above, the decision of the Eleventh Circuit, as it is worded, provides legal support for the proposition that Epilepsy is not a disability.* (See the discussion at page [illegible] above.).

7. *Epilepsy, at least when manifested by uncontrolled, reoccurring consciousness-losing seizures, would seem to be one of those rare impairments that may actually qualify as a disability "per se."*

*Conclusion*: There is nothing in the ADA that prohibits impaired individuals from refining their appellate arguments to include major life activities not raised below. Limiting appellate consideration of major life activities to those raised below, is a rule developed by the courts, and it places an unnecessary additional hurdle in the already difficult path of disabled workers. Further, while it may seem reasonable to limit appellant arguments to the activities identified below when one is attempting to qualify lesser-recognized impairments as disabilities, such a requirement does not seem reasonable when applied to a long recognized disability such as Epilepsy, particularly when the relatively unique nature of that impairment is considered.

b. Ms. Chenoweth is not asking *this Court* to suggest which major life activities are substantially limited by her seizures.

While she does contend that this Court has a right to suggest which major life activities are substantially limited by consciousness-losing seizures (whether the Court takes its lead from the arguments presented in this Petition, from the reasoning of other courts, from the Amicus Brief filed with the Eleventh Circuit below, from any Amicus Briefs it may

hereafter request from the EEOC, the Department of Justice, the Epilepsy Foundation or any other interested entity, or from its own observations and common sense), it is clear that Ms. Chenoweth has, in this Petition, specifically identified the major life activities which she claims are substantially limited by her impairment.

c. The record is more than adequate to support Ms. Chenoweth's claim that her seizures substantially limited one or more of her major life activities.

Ms. Chenoweth suffered at least three consciousness-losing seizures within four months, and it was not known how long she would continue suffer them. The number, duration, frequency, severity, recent occurrence and future uncertainty of these seizures were sufficient for Dr. Stevenson to consider it unsafe for her to cook or bathe alone, and for Florida law to consider it unsafe for her to drive. These factors were sufficient to prevent her from being able to depend on her ability to maintain her consciousness, and such inability is the underlying reason tne activities of caring for oneself and maintaining consciousness were substantially limited.

d. Epilepsy is not a "temporary condition."

There is a difference between a temporary *condition (e.g. a broken leg)* and a temporary *symptom* of a permanent impairment. Also, the requested accommodations were denied at a time when it was not yet known whether medication would ever bring Ms. Chenoweth's seizures under control. Therefore, it is without merit to argue that Ms. Chenoweth's Epilepsy, or even her seizures, were "temporary," at least in the relevant context of this case.

## III. THE ISSUE OF WHETHER THE ADA REQUIRES EMPLOYERS TO ACCOMMODATE KNOWN *COLLATERAL* LIMITATIONS OF A DISABILITY, IS PROPERLY BEFORE THIS COURT FOR CONSIDERATION.

a. The Opposition Brief's wording mischaracterizes this argument as it is presented in this Petition.

Ms. Chenoweth is not arguing that she should be accommodated simply because she is substantially limited in reproduction. She is arguing that her Epilepsy is a disability within the meaning of the ADA because it limits her reproduction; that her disability not only limits her reproduction, but also causes seizures; and that she is entitled to be accommodated because the seizures, a known collateral limitation of her Epilepsy, restrict her ability to perform her job. The accommodations requested are directly relevant to her ability to perform her job. The fact that there is no "relevance" between reproduction and Ms. Chenoweth's work or the accommodations she requested, or that there is no accommodation that her employer could give her to address the limitation to her reproduction, is immaterial.

b. The record is sufficient to establish a substantial limitation to Ms. Chenoweth's reproduction.

Hillsborough County does not explain how Ms. Chenoweth failed to demonstrate that she was substantially limited in the major life activity of reproduction. It is assumed that it is relying on the statement of Dr. Stevenson, who testified that the available data on Ms. Chenoweth's seizure medication, Lamictal, is insufficient to *establish* an increased risk of birth defects. From Ms. Chenoweth's perspective, however, she views said data as insufficient to *rule out* such increased risk. Given the relative importance

of the decision to reproduce, and the fact that such decision carries economic and legal consequences as well, and given the existing data that most seizure medications do cause significant increased risks to children born of Epileptic mothers, it is not unreasonable for Ms. Chenoweth to assume, until it is proven otherwise, that Lamictal carries the same increased risks as other seizure medications. The record testimony from Ms. Chenoweth (based on her degree and over 20 years of experience in nursing), that her knowledge of these inherent risks controlled her decision not to have a child, is unchallenged in the record and, *at least for the purpose of overcoming a motion for summary judgment,* must be taken as true. Fed. Rule Civ. Proc. 56(e). (*See* Bragdon at 641 for similar reasoning.).

## CONCLUSION

If you have ever seen a human collapse in a violent, shaking, twisting, distorting, convulsive, *grand mal* seizure, with their eyes rolled back in their head and blood rolling out of their mouth from having bitten through their tongue, there could be no doubt in your mind that this impairment significantly impacts numerous major life activities. If you have ever experienced reoccurring, unpredictable loses of consciousness, there would be no doubt in your mind that your ability to depend on your maintaining consciousness was substantially limited. Epilepsy, almost universally, has long been considered a disability. It is precisely the type of impairment that Congress had in mind when it passed the ADA. Accommodating disabled employees in overcoming limitations, which their disabilities place on their ability to get to work, is precisely the type of accommodation encouraged by the ADA and its implementing regulations. The decision, of the Eleventh Circuit below, concludes that such impairment is not protected by the ADA. We are asking this Court to overrule that conclusion.

Respectfully submitted,

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